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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2010

MARK-GARNER ASSOCIATES, INC.,

Petitioner,

vs.

BENSALEM TOWNSHIP and STEPHEN J. KELLY, THEODORE R. ZAJAC, WILLIAM McFADDEN, HERBERT BRADEN and DONALD BELL, Individually and in Their Official Capacities as the Board of Supervisors of Bensalem Township and STANLEY HOROWITZ, Individually and in His Capacity as Zoning Officer of Bensalem Township,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HENRY F. HUHN,
LESLIE G. DIAS,
Counsel for Respondents,

3569 Bristol Pike,
Suite 102
Bensalem, Pennsylvania 19020
(215) 639-4727

Pennsylvania Appellate Printing Co.—Call Toll Free—1(800) 526-7560

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QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals properly dismiss the cross-claim challenging the adoption and application of facially neutral local zoning ordinances to a development which was partially constructed for failure to state a claim upon which relief could be granted?

STATUTORY AND ORDINANCE PROVISIONS INVOLVED

53 P.S. 10508(4) provides in relevant part:

"When an application for approval of a plat, whether preliminary or final, has been approved or approved subject to conditions acceptable to the applicant, no subsequent change or amendment in the zoning, subdivision or other governing ordinance or plan shall be applied to affect adversely the right of the applicant to commence and to complete any aspect of the approved development in accordance with the terms of such approval within three years from such approval."

53 P.S. 10603(4) provides:

"Zoning ordinances may permit, prohibit, regulate, restrict and determine:
(4) Density of population and intensity of use."

53 P.S. 10604(2) provides in relevant part:

"The provisions of zoning ordinances shall be designed:
(2) To prevent . . . overcrowding of land. . . ."

53 P.S. 10614 provides:

"For the administration of a zoning ordinance, a zoning officer, who may not hold any elective office in the municipality, shall be appointed. The zoning officer shall administer the zoning ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance.

53 P.S. 10617 provides:

> "In case any building, structure, or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act or prior enabling laws, the governing body or, with the approval of the governing body, an officer of the municipality, in addition to other remedies, may institute in the name of the municipality any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation."

Section 522.1 of the Bensalem Township Zoning Ordinance of 1954, as amended on June 20, 1973 provided:

> "For every acre of land within the planned unit property development there shall be allowed a maximum of ten (10) condominium dwelling units within the development."

Section 522.1 of the Bensalem Township Zoning Ordinance of 1954, as amended on October 8, 1976 provided:

> "For every acre of land within the planned unit property development there shall be allowed a maximum of four (4) condominium dwelling units within the development."

STATEMENT OF THE CASE

This matter began as a class action civil rights action brought by residents of a housing development known as Bensalem Village against Bensalem Township and Stephen J. Kelly, Theodore R. Zajac, William McFadden, Herbert Braden and Donald Bell, individually and in their official capacities as the Board of Supervisors and Stanley Horowitz, individually and in his capacity as Zoning Officer of Bensalem Township, and Mark-Garner Associates, Inc. of Pennsylvania (the developer of Bensalem Village). The plaintiffs sought declaratory, injunctive and monetary relief. Defendant Mark-Garner (hereinafter, developer) filed a crossclaim against the other defendants and the Bensalem Township Zoning Hearing Board and two of its members both individually and in their official capacity. The developer also sought declaratory, injunctive and monetary relief. The municipal defendants (all defendants other than the developer) filed Motions to Dismiss plaintiffs' Complaint and the developer's crossclaim. The Lower Court heard testimony on March 21 and 22 on the requests for injunctive relief.[1] On January 12, 1979 the Lower Court (Judge McGlynn) dismissed plaintiffs' Complaint and the developer's crossclaim. Only the developer appealed to the Third Circuit Court of Appeals which affirmed.

Factually, the developer received approval from Bensalem Township for a 557 unit condominium development on or about May 16, 1973. The density (eleven units per acre) complied with the Zoning Ordinance at the time the plan was approved. On June 20, 1973 the allowable

1. It is the respondent's contention that the Motions to Dismiss were converted to Motions for Summary Judgment by operation of F.R.C.P. 12(b).

density in the R-4 District was lowered to ten units per acre and on October 8, 1976 it was reduced to four units per acre.[2] Between May 16, 1973 and September 24, 1976 some of the public improvements and somewhat over one hundred units were built. On September 24, 1976 and September 29, 1976, defendant Stanley Horowitz rejected the developer's applications for building permits because the development did not comply with the Zoning Ordinance's amended density requirements (ten units per acre at that time) nor was there an approved plan filed in accordance with the Township's Subdivision and Land Development Ordinance which had been adopted in December, 1975. The developer appealed to the Zoning Hearing Board which, after several hearings, denied the developer's appeal. The developer then appealed to the Court of Common Pleas of Bucks County, Pennsylvania, seeking to overturn the Zoning Hearing Board's decision. In addition, the developer also filed a separate mandamus action.[3] While the developer's Zoning Appeal and mandamus action were pending in the Court of Common Pleas, the instant action was filed.

The developer's crossclaim alleges the other defendants violated the developer's due process and equal protection rights under the Fourteenth Amendment of the United States Constitution and unlawfully took the developer's property without compensation. The developer

2. It should be pointed out that Bensalem Township did not enact its Zoning Ordinance until 1954 and, therefore, there were no density restrictions. Bensalem Township submits that all it has done is adapt its Zoning Ordinance to changing situations and times.

3. Developer's assertion on page 6 of its Petition for Writ of Certiorari, that developer sought injunctive relief in the Court of Common Pleas is false. In the mandamus action, summary judgment in favor of the defendants (respondents Bensalem and Horowitz) was recently granted on July 9, 1980.

also claimed violations of 42 U.S.C. 1983, 1985 and 1986. In addition, the developer claimed that it had been deprived of unspecified rights under unspecified state statutes, local laws and ordinances.

After this action was filed the Court of Common Pleas, in the Zoning Appeal, ruled that the developer was entitled to the permits. The Township appealed the decision, in the Zoning Appeal, to the Commonwealth Court of Pennsylvania. Thereafter, Judge McGlynn issued his Order dismissing plaintiff's Complaint and the developer's crossclaim. As indicated above, the developer's appeal to the Third Circuit was denied. The Township's appeal to the Commonwealth Court of Pennsylvania was sustained (*Appeal of Mark Garner Associates, Inc.*, — Pa. Cmwlth. —, 413 A.2d 1142 (1980)) and no appeal has been taken therefrom.

SUMMARY OF RESPONDENTS ARGUMENT

It is the respondents position that the decision of the Third Circuit Court of Appeals, affirming the dismissal of the crossclaim was correct.

The allegations in petitioner's crossclaim, accepted as true, do not amount to a denial of equal protection. It is not alleged that the zoning ordinances in question single out the petitioner's development, applying equally to all R-4 Zoning Districts. There are no facts alleged to support a claim of unequal application of the ordinances and, in fact, the thrust of petitioner's argument is that the respondents intentionally applied its ordinances to all developers with final plan approval which application had a greater impact on those developers with final plan approval than those without it. Zoning ordinances can constitutionally have a great impact on property and property owners. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926). The law does not require that a municipality treat differently developers with final plan approval as opposed to those property owners who don't have final plan approval. The respondents are under applicable Pennsylvania law required to enforce local ordinances and the failure to do so could give rise to a civil rights action. *Beaver v. Borough of Johnsonburg*, 375 F. Supp. 326 (W.D.Pa. 1974). There is further no conflict between the Third Circuit's decision herein and *Williams v. Illinois*, 399 U.S. 235 (1970) and any comparison between indigent criminal defendants and real estate developers is ludicrous.

Further, the allegations in petitioner's crossclaim do not state a cause of action for the taking of property without compensation. The petitioner can still make use of its property, building 200 units (at a density of 4 per acre).

Indeed, the crossclaim on its face shows that the property still has value. Zoning ordinances have been upheld even though they have a substantial impact on property values, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S. Ct. 2358, 49 L.Ed.2d 132 (1976), and even though they make property completely unmarketable in a practical sense. *Kopetzke v. County of San Mateo Board of Supervisors*, 396 F. Supp. 1004 (N.D.Cal. 1975). Taking challenges have been denied even when the government action prohibits a preexisting use. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978). Nor is there any requirement that there must be a hearing on every alleged taking. *Agins v. City of Tiburon*, – U.S. –, 48 U.S.L.W. 4700 (June 10, 1980) (decided on demurrer). In addition, petitioner has not sought relief under the Pennsylvania Eminent Domain Code, 26 P.S. 1-101 *et seq.* *Kao v. Red Lion Municipal Authority*, 381 F. Supp. 1163 (M.D.Pa. 1974); *Kahlasch v. New York State Thruway Authority*, 460 F. Supp. 956 (S.D. N.Y. 1978).

Finally, petitioner's crossclaim was properly held not to state a cause of action on substantive due process grounds. Petitioner does not contend that respondents lack the authority to enact the ordinances in question nor that the ordinances are on their face unconstitutional. Indeed, the enabling statute fully recognizes a municipalities right to regulate density and prevent overcrowding. Petitioner's sole argument against the ordinances and their application is that they were done with an improper motive. This is not an element of an action under 42 U.S.C. 1983, *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969) *cert. denied*, 396 U.S. 901, 90 S. Ct. 210, 24 L.Ed.2d 177, *Coghlan v. Phillips*, 447 F. Supp. 21 (Miss. 1977), *aff'd* 567 F.2d 652, and an otherwise lawful ordinance does not

become unlawful due to an improper motive in its enactment or application. Any other result would have the Courts inquiring into legislative motivation which not only would be a great intrusion into the legislative process but would also be a complete reversal of the rational relationship test.

The Court of Appeals applied the proper standard of review consistent with this Court's decisions. The petitioner is not entitled to relief since the well pleaded facts in its crossclaim do not show a violation of its constitutional rights.

ARGUMENT

I. The decision of the Third Circuit Court of Appeals affirming the dismissal of Mark Garner's crossclaim was correct.

A. *Equal Protection*

Boiled down to its basics, developer alleges that it was denied equal protection because the amendments to the Zoning Ordinance, as applied, fell most harshly on a particular class of developers, to wit, those with final plan approval. Nowhere is it alleged that the ordinances in question single out the developer's development and, in fact, the ordinances apply equally to all R-4 Zoning Districts within Bensalem Township. Nor has developer alleged any facts to support its allegation of unequal application of the law. There is no allegation that another developer in Mark Garner's situation was granted building permits, assuming *arguendo* that such would state a cause of action for denial of equal protection. See *Bernbaum v. Trussel*, 271 F.2d 672, 676 (2nd Cir. 1966). In fact, the thrust of developer's argument is that the Township intentionally applied its ordinances to all developers with final plan approval which application had a greater impact on those developers than on developers who had not secured final plan approval. However, it is obvious since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926) that zoning ordinances can constitutionally have a great impact on property and property owners. As the Sixth Circuit stated in *Studen v. Beebe*, 588 F.2d 560, 565 (6th Cir. 1978):

> "All zoning plans have inherent within them a discrimination between the various land uses permitted

> thereunder. Under the facts of this case there is no distinction in treatment between plaintiffs and any similarly situated property owners. Consequently, the classification to which plaintiffs have been subjected is that which permeates all zoning, and does not amount to a denial of equal protection."

In reality, developer's argument is that developers with final plan approval must constitutionally be treated differently. Respondents submit that this is not the law. Certainly, Pennsylvania has allowed municipalities to apply ordinances enacted after final plan approval to developments previously approved. *Appeal of Mark Garner Associates, Inc.*, — Pa. Cmwlth. —, 413 A.2d 1142 (1980); *Appeal of Central Penn National Bank*, — Pa. Cmwlth. —, 408 A.2d 550 (1979); *York Township Zoning Board of Adjustment v. Brown*, 407 Pa. 649, 182 A.2d 706 (1962). Indeed, the constitutional challenge raised by the developer in the Pennsylvania courts was denied. *Appeal of Mark Garner, supra.*

In the case at bar municipal defendants (and particularly, defendant Horowitz, the Township's Zoning Officer) consistent with Sections 508(4) and 614 of the Pennsylvania Municipalities Planning Code, 53 P.S. 10508(4) and 10614, applied the Zoning Ordinance equally to all persons in the developer's situation. When the three year period provided by 53 P.S. 10508(4) ended, changes in the Zoning Ordinance were applied to developer as permitted by Pennsylvania law. Indeed, the Zoning Officer is specifically mandated by statute to "administer the Zoning Ordinance in accordance with its literal terms," 53 P.S. 10614, and the Board of Supervisors, as governing body of the Township, has the power to prevent violations of local ordinances, 53 P.S. 10617. The failure to enforce lawful ordinances could give rise to a civil rights action.

Beaver v. Borough of Johnsonburg, 375 F. Supp. 326 (W.D. Pa. 1974).

Petitioner places great reliance on *Williams v. Illinois*, 399 U.S. 235 (1970), however, it is submitted that comparing real estate developers to indigent criminals is ludicrous. Unlike the indigent in *Williams*, developer was not subject to any such illusory choice. Developer could have completed the development in three years but chose not to do so. (In fact, developer's construction lender did not allow the developer to secure more than twenty-five (25) building permits in advance of sales.) Further, developer could have locked itself into a guaranteed five-hundred (500) units had it filed a simple sketch plan between June, 1973 and October, 1976. It chose not to do so. Now, however, developer seeks some sort of special exemption from an admittedly valid, neutral ordinance despite the fact that any loss suffered by developer was occasioned by developer's own neglect and/or the actions of its construction lender. This would seem to be the opposite of equal protection. Respondents would submit that there is no inconsistency between Your Court's opinion in *Williams* and the Third Circuit's decision herein.

B. *Taking Without Just Compensation*

It is respondents' position that their actions did not constitute a taking of the developer's property under the Fifth Amendment. Though not specifically stated either in the complaint or the petition, it seems apparent that the developer's argument is directed toward the 1976 ordinance reducing the permitted density to four units per acre.[4] It must be remembered that the rejections of

4. Respondents would submit that, as a matter of law, a reduction in the permitted development from 557 units to 500 units would not constitute a taking.

developer's permit applications by respondent Horowitz was not based on this ordinance but rather on the 1973 ordinance (reducing the density to ten per acre) and the 1975 Subdivision and Land Development Ordinance. No plan has been filed pursuant to the 1976 ordinance and, in fact, petitioners' Vice President testified that petitioner was unwilling to submit plans for approval under the 1976 ordinance, though this would have permitted two-hundred (200) units to be built.

Respondents submit that no taking of the developer's property has occurred. The developer is still able to use its property. There is no allegation in developer's cross-claim that developer has been deprived of all reasonable use of its property and, in fact, it is admitted that it can still use its property, *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455 (Maryland 1978). All that is claimed is a diminution in value, loss of profits and increased expense. Zoning Ordinances have been sustained even though they have an impact on property values *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S. Ct. 2358, 2362; 49 L.Ed.2d 132, 138 (1976); *Euclid, supra; Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L.Ed.2d 797 (1974); *Block v. Hirsh*, 256 U.S. 135, 155. In fact, ordinances have been applied even though they made property completely unmarketable in a practical sense. *Kopetzke v. County of San Mateo Board of Supervisors*, 396 F. Supp. 1004 (N.D. Cal. 1975).

Further, assuming *arguendo* that a "taking" has occurred, this does not mean that the developer's federal constitutional rights have been violated, since compensation is available under Pennsylvania's Eminent Domain Code, 26 P.S. 1-101 *et seq. Kao v. Red Lion Municipal Authority*, 381 F. Supp. 1163, 1165-66 (M.D. Pa. 1974)

and cases cited therein. See also *Kahlasch v. New York State Thruway Authority*, 460 F. Supp. 956 (S.D. N.Y. 1978). Developer is in no way precluded from initiating an appropriate action and seeking relief under the Eminent Domain Code for compensation. However, at the writing of this Brief, some forty-six (46) months have passed since permits were rejected and developer has never sought relief under the Eminent Domain Code.

It is the respondents position that the District Court was correct in its statement that:

> "The preservation of open space, the restriction of excessive traffic, and the prevention of overcrowding are all legitimate goals, and density ordinances are reasonable means to accomplish these goals."

It is submitted that these remain legitimate goals and a density ordinance is still a reasonable way to accomplish these goals even though the development has been started.[5] This is especially so when the developer can comply with the amended ordinance (*i.e.*, build 200 units) and is, in fact, not challenging the Zoning Ordinance amendments. Taken to their logical conclusion, developer's argument narrows down to the proposition that once a developer secures final approval it is constitutionally free from any changes in the Zoning Ordinance. This is clearly not the law. *Euclid, supra.*

As Your Honorable Court stated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.E.2d 631:

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5. Petitioner's allegations of an improper motivation will be addressed *infra.*

> "... 'taking' challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." 438 U.S. 125.

Petitioner, in part, bases its argument on the fact that its allegation of a taking was dismissed without a hearing,[6] allegedly in conflict with this Court's decision in *Penn Central, supra.* Recently, Your Honorable Court in *Agins v. City of Tiburon,* – U.S. –, 48 U.S.L.W. 4700 (June 10, 1980) unanimously determined that an ordinance allowing between one and five houses on a five acre tract did not constitute a taking. The interesting thing about *Agins,* in addition to the fact that the ordinance therein allowed a much less intensive use than the ordinance challenged herein, is the fact that it was decided on a demurrer. Obviously, therefore, no factual hearing was held. It is submitted that, accepting as true the allegations of developer's crossclaim, no hearing was necessary to determine that no taking had occurred.

C. *Substantive Due Process*

In addressing this issue, the present status of the dispute between the developer and the Township must be stated. It has been held that the Township can constitutionally apply the ordinances enacted after the developer's final plan approval to the developer. *Appeal of Mark Garner, supra.* Further, the developer "has never contended that the Board of Supervisors lacked the authority to enact the kind of zoning amendments involved

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6. Respondents would submit that this is not what happened. See note 1, *supra.*

here" (Petition for Writ of Certiorari, p. 8). For that matter, the developer has never contended that the ordinances reducing the permitted density from twelve units per acre are on their face unconstitutional. It is also clear under the enabling statute (Pennsylvania Municipalities Planning Code, 53 P.S. 10101 *et seq.*) that "zoning ordinances may permit, prohibit, regulate, restrict and determine density of population and intensity of use" (53 P.S. 10603(4)) and that "the provisions of zoning ordinances shall be designed to prevent . . . overcrowding of land" (53 P.S. 10604(2)). Indeed, Section 100 of the Bensalem Township Zoning Ordinance provides:

> "This Ordinance is enacted for the following purposes: To promote the health, safety, morals and general welfare of the inhabitants of Bensalem Township by lessening congestion in the roads and highways, securing safety from fire, flood, panic and other dangers; to protect property and to prevent obstruction of streams and waterways, providing adequate light and air; *preventing the overcrowding of land; avoiding undue concentration of population;* facilitating adequate provision for transportation, water, sewerage, schools, parks and other public requirements; conserving the value of buildings and encouraging the most appropriate use of land." (Emphasis added.)

The minutes of the meeting of June 20, 1973 at which the ordinance reducing the permitted density to ten per acre was adopted show that the Board of Supervisors had input from the public, the Township Planning Commission and a private planner.[7] As to the period after 1973 the

7. These minutes were attached to the respondents' Motion to Dismiss filed in the District Court and are found at Pp. 47a-48a of the Appendix to the Appellants Brief in the Third Circuit.

following testimony presented at the hearing on the preliminary injunction is relevant.

"BY MR. BROOKMAN:

Q. Since 1974 have there been a series of zoning changes that has, in effect, reduced the density levels in Bensalem Township?

MR. HUHN: Objection.

THE COURT: Overruled.

THE WITNESS: I don't know what you mean by series. There have been some.

BY MR. BROOKMAN:

Q. And what were the nature of those amendments to the zoning ordinance?

A. You are talking about the amendments? There were reductions in density in all classifications.

Q. And do you recall what the initial densities were—strike that.

Has there ever been expressed at a public meeting that you have attended in your official capacity of why these zoning ordinance amendments were being passed?

MR. HUHN: Objection.

THE COURT: She can say yes or no.

THE WITNESS: Yes.

BY MR. BROOKMAN:

Q. And what was so expressed?

A. That the densities, the prior densities were just too high, 12 to the acre, for example.

I mean that was the advisements given to the Board through the Planning Commission to reduce the densities.

Q. Did the Township ever retain the services of any outside consultants to assist them in making these determinations?

A. Yes, sir.

Q. Do you recall the name of that consulting firm?

A. Urban Research and Development for one and the Bucks County Planning Commission.

Q. Do you recall what the recommendations were of the Urban Research firm?

A. I do not know. It was to reduce the densities. I don't remember the exact figures."

It must also be remembered that:

"An ordinance comes to the courts clothed with every presumption of validity . . . (Zoning factors are) primarily for legislative concern, unless . . . we have patently a capricious and irrational invasion of property, the merits undebatable by reasonable men, the action indefensible to any save those whose minds have been made incandescent by partisan zeal or pursuit of gain." *City of Ann Arbor, Michigan v. Northwest Park Construction Corp.*, 280 F.2d 212, 223 (6th Cir. 1960).

Reading the developer's crossclaim in its best light, it appears to be developers position that even though there is no question as to the authority to enact and apply

the ordinances nor apparently as to the ordinances validity, these facially neutral ordinances should not apply to developer because they were allegedly enacted and applied with an improper motive or for an improper purpose.[8] Interestingly, developer's crossclaim does not seek a declaration that any of the ordinances involved herein be declared unlawful or unconstitutional. It is respondents' position that:

> "an improper motive or purpose on the part of the defendants is not an element for a cause of action under Section 1983, *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), *cert. denied* 396 U.S. 901, 90 S. Ct. 210, 24 L.Ed.2d 177." *Coghlan v. Phillips*, 447 F. Supp. 21 (Miss 1977), *aff'd* 567 F.2d 652. See also *Gomez v. Toledo*, — U.S. —, 48 U.S.L.W. 4600 (May 27, 1980).

In other words, the initial inquiry is whether the conduct as alleged violates the Constitution.[9] Indeed, it is questionable whether motive itself is important even for purposes of defense. However, respondents would submit that an otherwise lawful act does not become unlawful due to an improper motive. Further, there are sound policy reasons to avoid such an inquiry into the legislative motivation. Besides the practical fact that it would often be impossible to determine the motivation behind the passage of an ordinance or the enforcement thereof, such

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8. This allegation permeates developer's entire petition and is relied on in each of the arguments contained therein.

9. For reasons cited in Arguments A & B, *supra*, it is the respondents' position that the Third Circuit Court of Appeals properly determined that petitioner had not alleged a violation of its constitutional rights.

an inquiry would represent not only a great intrusion by the federal courts into the legislative process but would be a complete reversal of the rational relationship test and the deference it accords to legislative judgments dealing with business and economic matters.[10] Simply stated, the inquiry is not why the legislature acted as it did, but whether it had the power to do so.

It should be pointed out that in the case at bar it would have been factually impossible for the respondents to have passed the ordinance of June 20, 1973 for any purpose since only one of the respondents (respondent Zajac) was on the Board of Supervisors at the time. The purpose for the enactment of the ordinance of October 8, 1976 is immaterial since permits were not denied on the basis of that ordinance and, in fact, were denied before that ordinance was adopted.

As to the application of the ordinance of June 20, 1973 to petitioner, respondents would again assert that respondent Horowitz was under a statutory obligation to apply the zoning ordinance in accordance with its literal terms. Also, it was his testimony that he never spoke to anyone in the Township, including the Supervisors, before issuing the rejection to petitioner. (Notes of Testimony, March 22, 1977, p. 154.) Respondents would suggest that inquiring into why respondent Horowitz did what he was lawfully entitled and obligated to do would be inimical

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10. This deference is apparent in *Dieffenbach v. Attorney General of Vermont*, 604 F.2d 187 (2nd Cir. 1979). In that case, despite the Attorney General's concession that the law in question violated the plaintiff's equal protection rights, the Court upheld the act and, in effect, created or theorized possible purposes for the act. See also *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

to the proper functioning of municipal government and, for that matter, all government.

Contrary to the petitioners assertion, the Court of Appeals applied the proper standard of review consistent with Your Honorable Court's prior holdings. What the Court of Appeals (and for that matter the District Court) has held is that, accepting the well pleaded allegations of developers crossclaim as true, the developer is not entitled to relief since the allegations of the crossclaim do not show a deprivation of any federal right.[11]

Respondents believe that the following language from the decision in *Wallach v. City of Pagedale, Mo.*, 359 F.2d 57, 59 (8th Cir. 1966) is particularly appropriate herein:

> ". . . no civil rights action exists by reason of the enforcement of a lawful ordinance." See also *Mosher v. Bierne,* 357 F.2d 638 (8th Cir. 1966).

As Judge McGlynn stated in sustaining the respondents Motion to Dismiss:

> "This is another zoning controversy in which the plaintiffs and defendants cross-claimant sought to add the leverage of this Court to their dispute with the Township Supervisors by alleging that their constitutional rights were violated as the result of the denial of additional building permits." (Appendix to Petition for Writ of Certiorari Pp. A35-A36.)

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11. As indicated *supra*, the Township's position has already been sustained in state court, to wit, that Section 508(4) of the Municipalities Planning Code, 53 P.S. 10508(4) allows the application of the later ordinances to the petitioners development. Respondents would submit that inferentially petitioner is attacking the constitutionality of the Municipalities Planning Code.

Having been rebuffed by the state courts,[12] the developer's petition is nothing more than a last ditch effort to secure unlawful permits so as to complete a development which would violate valid ordinances. There is nothing in this case which would merit granting the petition.

12. Interestingly, developer never sought relief in the state courts by way of a variance though arguably this would have been the procedure by which developer might have secured relief from the zoning amendments.

CONCLUSION

Both the District Court and the Court of Appeals properly determined that petitioner's crossclaim did not state a cause of action. The facts, as alleged, do not amount to a denial of equal protection or substantive due process nor do they amount to a taking of petitioner's property without just compensation. The Court of Appeals' decision is not in conflict with the decisions of another Court of Appeals or of this Court. There are no special and important reasons for the granting of the petition for *writ of certiorari* and respondents respectfully request that the petition for *writ of certiorari* be denied.

Respectfully submitted,

HENRY F. HUHN,
LESLIE G. DIAS,
Counsel for Respondents